

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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1 HUBEL, M.J.:

2 For the third time, this matter is before the court on a
 3 motion to dismiss (Dkt. #62), this time directed to the plaintiff's
 4 Second Amended Complaint (Dkt. #52). In my Findings and Recommen-
 5 dation on the defendants' motion to dismiss the plaintiff's First
 6 Amended Complaint, I summarized the procedural history of the case
 7 as follows:

8 On October 31, 2008, I granted the plaintiff
 9 Charles W. Miller's application for a writ of
 habeas corpus pursuant to 28 U.S.C. § 2241.
 See *Miller v. Thomas*, No. CV-08-789-HU, 2008
 WL 4793035 (D. Or. Oct. 31, 2008). On Decem-
 10 ber 20, 2004, Miller was sentenced by the
 11 Honorable Robert H. Whaley of the United
 States District Court for the Eastern District
 12 of Washington, to 24 months' imprisonment upon
 revocation of Miller's federal term of super-
 13 vised release ("TSR"). *Id.* In a nutshell, I
 14 found the Bureau of Prisons ("BOP") acted
 arbitrarily in failing to designate the place
 15 of Miller's imprisonment as a Washington State
 correctional facility to effect the intent of
 the sentence imposed by Judge Whaley. Had the
 16 BOP acted appropriately, Miller would have
 been released from prison no later than
 April 23, 2008. See *id.*; cf. Dkt. #2-8
 (claiming his release date should have been
 April 7, 2008). Instead, due to the BOP's
 17 error, Miller was not released until Novem-
 18 ber 7, 2008.

19 On December 4, 2009, Miller filed a
 20 notice of tort claim with the BOP alleging
 21 "financial earnings, emotional distress and
 family hardship was [sic] suffered from the
 . . . wrongful imprisonment that B.O.P. staff
 22 knew about, but hindered at every chance."
 Dkt. #2-8, p. 1. Miller requested \$450,000 in
 23 damages for "personal injury." *Id.*; Dkt. #2,
 ¶ 26. When his claim went unanswered for
 24 "over 90 days," Miller filed the instant
 action for damages. See Dkt. #2.

25 The Defendants moved to dismiss Miller's
 26 original Complaint. On February 22, 2012, I
 submitted Findings and Recommendation, in
 27 which I recommended the motion be granted in
 part and denied in part. Dkt. #39. Spe-
 28 cifically, I found Miller had alleged facts
 sufficient to excuse the exhaustion

1 requirement of the Prison Litigation Reform
 2 Act; none of the Defendants was entitled to
 3 qualified immunity; Miller could maintain a
 4 *Bivens*-type action FN1/ without calling into
 5 question the sentence imposed, or extending
 6 *Bivens* into a new type of action; the
 7 Defendant Cheryl Pauley had not been served
 8 properly and should be dismissed from the
 9 case; and Miller's claim for injunctive relief
 10 was moot. See *id.*

11 FN1/ Referring to *Bivens v. Six*
 12 *Unknown Named Agents of the Federal*
 13 *Bureau of Narcotics*, 403 U.S. 388,
 14 91 S. Ct. 1999, 29 L. Ed. 2d 619
 15 (1971).

16 On May 23, 2012, District Judge Michael
 17 Mosman adopted my recommendations in part.
 18 Dkt. #39. Where Judge Mosman diverged from my
 19 findings was with regard to Warden Thomas's
 20 immunity. Judge Mosman found Warden Thomas
 21 was entitled to qualified immunity, "to the
 22 extent [Miller was] arguing that the warden
 23 had a duty to investigate [Miller's] allega-
 24 tion of overdetention based solely on his
 25 informal verbal complaint." *Id.*, p. 6. Judge
 26 Mosman directed Miller to file an amended com-
 27 plaint, if Miller felt he was "able to suffi-
 28 ciently plead some factual basis under *Iqbal*/
 29 *Twombly* FN2/ for imputing the actions of Does
 30 1-3 to Warden Thomas." *Id.*, pp. 6-7.

31 FN2/ Referring to *Ashcroft v. Iqbal*,
 32 556 U.S. 662, 129 S. Ct. 1937, 173
 33 L. Ed. 2d 868 (2009); and *Bell*
 34 *Atlantic Corp. v. Twombly*, 550 U.S.
 35 544, 127 S. Ct. 1955, 167 L. Ed. 2d
 36 929 (2007).

37
 38 Dkt. #45, pp. 2-4.

39 In response to Judge Mosman's order, Miller filed a First
 40 Amended Complaint on June 13, 2012. Dkt. #40. The defendants
 41 moved to dismiss. I found Miller had failed to allege a sufficient
 42 factual basis to support liability against Warden Thomas, and also
 43 that Warden Thomas was entitled to qualified immunity. With regard
 44 to the defendants "Does 1-3," I found Miller had failed to provide
 45 enough information to allow the Government to identify the indi-
 46 viduals who were the objects of Miller's claims. I recommended

1 that Miller be allowed to conduct discovery to attempt to determine
 2 the identities of Does 1-3. I further found Miller had abandoned
 3 any claim under the Federal Tort Claims Act, and therefore recom-
 4 mended any such claim be dismissed. Dkt. #45, pp.5-10. Judge
 5 Mosman adopted my recommendations as his own. Dkt. #47.

6 Thereafter, the court set deadlines for discovery to proceed.
 7 See Dkt. #50. On April 10, 2013, Miller propounded two interroga-
 8 tories to the Government, one of which asked the Government to
 9 "[i]dentify all prison employees that worked from March 2008
 10 through July 2008 at the Federal Detention Center, Sheridan, Oregon
 11 or at the Federal Correctional Institution, Sheridan, Oregon,"
 12 including each such individuals' "full name, positions held, dates
 13 and shifts worked, [and] last known address and telephone number."
 14 Dkt. #69-3, ECF p. 2.

15 The Government did not object to the interrogatory as overly
 16 broad, did not file a motion for protective order, and apparently
 17 did not confer with Miller's counsel to attempt to narrow the scope
 18 of the interrogatory. Instead, the Government unilaterally nar-
 19 rowed the scope of the interrogatory based on Miller's allegations
 20 in his original complaint and first amended complaint. See Dkt.
 21 #63, ECF p. 2; Dkt. #64-1, ECF p. 1; *cf.* Dkt. #68, ECF p. 2. In
 22 Miller's original complaint, which he filed *pro se*, Miller alleged,
 23 upon his "best knowledge and belief," that Does 1-3 all were Oregon
 24 residents, subject to this court's jurisdiction. He alleged Doe 1
 25 "Worked in the F.C.I. Sheridan Records office and he is responsible
 26 for the enforcement of prisoner's [sic] judgment and sentences, and
 27 timely release of prisoners in his custody and care." Dkt. #1,
 28 ¶ 10. He alleged Doe 2 "works in the F.C.I. Sheridan Records

1 office and she is responsible for the enforcement of prisoner's
 2 [sic] Judgment and Sentences, [and] the calculation and computation
 3 of prisoners [sic] in her custody and care." *Id.*, ¶ 11. He
 4 alleged Doe 3 "works in the F.C.I. Sheridan Records Office and she
 5 is responsible for the enforcement of prisoner's [sic] Judgment and
 6 Sentences, the calculation and computation of prisoner sentences,
 7 and timely release of prisoners in her custody and care." *Id.*,
 8 ¶ 12.

9 In his First Amended Complaint, filed with the assistance of
 10 counsel, Miller alleged, "[o]n information and belief," that Does
 11 1-3 "work in the F.C.I. Sheridan and are responsible for the
 12 calculation and enforcement of prisoners['] sentences, and timely
 13 release of prisoners in their custody and care." Dkt. #40, ¶ 1.
 14 He further alleged that "[e]very week from May of 2008, until the
 15 summer of 2008, [he] approached Does 1-3 in the F.C.I. Sheridan
 16 Records Office trying to resolve the wrongly calculated release
 17 date." *Id.*, ¶ 9.

18 Thus, in Miller's original Complaint, he clearly alleges Does
 19 1-3 work in the F.C.I. Sheridan Records Office. In his First
 20 Amended Complaint, he alleges Does 1-3 work at the facility, and he
 21 indicates he approached Does 1-3 in the Records Office. Based on
 22 these allegations, the Government responded to Miller's interrogatory
 23 with the names of the four individuals - two men and two women
 24 - who staffed the Records Office at FCI Sheridan between March 2008
 25 and September 2008. Dkt. #64-1. Although the Government's
 26 response encompassed a broader time period than specified in
 27 Miller's interrogatory, the Government unilaterally narrowed the
 28 scope of the interrogatory, which requested the names of all

1 employees at the facility during the specified time period. As a
2 result of the narrowed response, Miller indicates, in his response
3 to the current motion to dismiss, that he "will pursue discovery,
4 including filing motions to compel if necessary." Dkt. #69, ECF
5 p. 1.

6 Miller filed his Second Amended Complaint on June 17, 2013,
7 naming as defendants the four individuals whose names were supplied
8 to him by the Government. Miller effected timely service on three
9 of the individuals - Buckholtz, Kallunki, and Potter. The
10 defendant William Cooley was not served, and the Government
11 indicates Cooley is deceased. Therefore, William Cooley should be
12 dismissed from the case.

13 In addition to Buckholtz, Kallunki, and Potter, Miller once
14 again named "Does 1-3" as defendants. As noted above, Miller
15 proposed to do further discovery in an attempt to identify addi-
16 tional individuals who allegedly violated his rights, substituting
17 them for "Does 1-3." The Government objected to Miller's request
18 for further discovery. The undersigned overruled that objection,
19 and ordered that the depositions of Buckholtz, Kallunki, and Potter
20 be taken. Those depositions have been completed. However, the
21 Government acknowledges that it never responded formally to
22 Miller's discovery requests.

23 Among those discovery requests were requests for admissions.
24 At oral argument on Miller's motion to compel discovery (Dkt. #80),
25 Miller's counsel argued the requested admissions should be deemed
26 admitted due to the Government's failure to respond, pursuant to
27 Federal Rule of Civil Procedure 36(3). The Government requested
28 the opportunity to respond to Miller's argument, which the

1 undersigned granted. I set deadlines for the Government to respond
2 fully to Miller's outstanding discovery requests, and for the
3 parties to brief the issue of whether the Government's failure to
4 respond to Miller's requests for admissions should result in those
5 matters being deemed admitted. See Dkt. #88 (Minute Order).
6 Thereafter, at oral argument on April 30, 2013, I granted Miller's
7 motion to deem the requests for admissions admitted as to the
8 United States generally, for lack of a timely response. See Dkt.
9 #92. I reserved ruling on the motion with respect to the Doe
10 defendants, as discussed further below and in the order, Dkt. #92.

11 Returning to the Government's motion to dismiss Miller's
12 Second Amended Complaint, although the court previously found
13 Miller had abandoned any claim under the Federal Tort Claims Act,
14 he has once again alleged this court's jurisdiction under the Act.
15 See Dkt. #52, ¶ 2. To the extent Miller's pleading can be
16 construed as alleging a claim under the Act, such a claim should be
17 dismissed.

18 The defendants argue Miller's Second Amended Complaint should
19 be dismissed in full because Miller has failed to state a claim
20 against the three named defendants for which relief can be granted,
21 and in any event, because all three of the defendants are entitled
22 to qualified immunity.* Dkt. #63.

23 Miller's allegations against the three named defendants are
24 all made against the defendants as a group; he makes no specific
25

26 *The defendants also argue Miller has failed exhaust his
27 statutorily-mandated administrative remedies against these three
28 defendants. Because the court finds the defendants' motion should
be granted on other grounds, the court does not address this
argument.

1 allegations against any individual defendant. The court afforded
 2 Miller ample opportunity to conduct discovery, including taking the
 3 depositions of the three named defendants. Despite that discovery,
 4 Miller's allegations against this group of defendants is no more
 5 specific than when he asserted claims against the unnamed "Does 1-
 6 3."

7 The United States Supreme Court has made it clear that in
 8 suits brought pursuant to *Bivens v. Six Unknown Named Agents of the*
9 Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L.
 10 Ed. 2d 619 (1971), and 42 U.S.C. § 1983, "a plaintiff must plead
 11 that each Government-official defendant, through the official's own
 12 *individual actions*, has violated the Constitution." *Ashcroft v.*
13 Iqbal, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868
 14 (2009) (emphasis added); see, e.g., *Jones v. Williams*, 297 F.3d
 15 930, 934-35 (9th Cir. 2002) ("In order for a person acting under
 16 color of state law to be liable under section 1983, there must be
 17 a showing of personal participation in the alleged rights depriva-
 18 tion[.]") (citing, *inter alia*, *Taylor v. List*, 880 F.2d 1040, 1045
 19 (9th Cir. 1989) (same)). Miller has failed to meet this basic
 20 pleading standard. He failed to make allegations regarding any
 21 individual defendant's actions. As a result, Miller has failed to
 22 state a claim for which relief may be granted, and his Second
 23 Amended Complaint should be dismissed.

24 Moreover, the currently-named defendants are entitled to
 25 qualified immunity. Both the undersigned and Judge Mosman dis-
 26 cussed the standards for qualified immunity in connection with
 27 motions to dismiss Miller's previous complaints. See Dkt. #'s 36,
 28 39. As stated succinctly by Judge Mosman, "the issue as to

1 qualified immunity in this case is whether defendants would have
 2 understood that they were violating plaintiff's constitutional
 3 rights by failing to respond to his complaints that his sentence
 4 was miscalculated by performing an investigation." Dkt. #39, ECF
 5 p. 4 (citing *Alston v. Read*, 663 F.3d 1094 (9th Cir. 2011)). As
 6 the Ninth Circuit Court of Appeals has held, "[I]f a prisoner
 7 raises factual questions about the calculation of his sentence, and
 8 the prison officials do nothing, or only go through the bare form
 9 of a response with no investigation - in one court's formulation,
 10 if they 'sit on [their] duff and [don't] do anything' - then the
 11 effective denial of any meaningful opportunity to be heard can
 12 amount to a denial of due process." *Davis v. Oregon*, slip op.,
 13 2010 WL 3259924, at *3 (D. Or. Aug. 16, 2010) (Mosman, J.)
 14 (emphasis added; quoting *Alexander v. Perrill*, 916 F.2d 1392, 1395
 15 (9th Cir. 1990) ("Prison officials who are under a duty to investi-
 16 gate claims of computational error in the calculation of prison
 17 sentences may be liable for their failure to do so when a
 18 reasonable request is made."). A failure to investigate, then,
 19 could provide evidence of the prison officials' state of mind. See
 20 *id.*

21 Here, however, Miller has specifically alleged that an inves-
 22 tigation was conducted, and it was the Bureau of Prisons, not any
 23 of the named defendants, that miscalculated his sentence. Miller
 24 alleges, "In or around the summer of 2008, Miller's dogged per-
 25 sistence caused the Bureau of Prisons (B.O.P.) to make an official
 26 sentence computation analysis in the B.O.P.'s Designation and
 27 Sentence Computation Center in Grand Prairie, Texas. That office
 28 incorrectly calculated the sentence. . . ." Dkt. #52, ¶ 10

1 (emphasis added). There was (and is) no clearly-established law
2 that would have indicated to the currently named defendants that
3 they would be violating Miller's rights by relying on the BOP's
4 sentencing computation. See *Ashcroft v. al-Kidd*, ___ U.S. ___,
5 ___, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011) (citing
6 *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73
7 L. Ed. 2d 396 (1982)) (standards for qualified immunity); see also
8 *Butz v. Economou*, 438 U.S. 478, 507, 98 S. Ct. 2894, 2911, 57
9 L. Ed. 2d 895 (1978) ("Federal officials will not be liable for
10 mere mistakes in judgment, whether the mistake is one of fact or
11 one of law."). Accordingly, the defendants are entitled to
12 qualified immunity.

13 It appears that, through the additional discovery, Miller has
14 been able to identify the individuals with the Bureau of Prisons
15 who miscalculated his sentence. Whether he can allege facts to
16 state a viable claim against those individuals remains to be seen.
17 Miller should be afforded another opportunity to amend his
18 Complaint to name the appropriate parties defendant, and allege his
19 claim against them. Therefore, although the undersigned finds
20 Miller's Second Amended Complaint should be dismissed as to the
21 defendants Buckholtz, Cooley, Kallunki, and Potter, Miller should
22 be allowed one last chance to amend his pleading to state, in good
23 faith, viable claims against defendants from the BOP that he
24 actually names. For this reason, the undersigned has reserved
25 ruling on Miller's request to have his requests for admission
26 deemed admitted with regard to these Doe defendants, "until such
27 time as those defendants are named and have an opportunity to take
28 a position on the requests for admissions." Dkt. #92, p. 3.

CONCLUSION

For the reasons discussed above, the undersigned recommends the defendants' motion to dismiss Miller's Second Amended Complaint be **granted**, but the dismissal be **without prejudice**. The defendant William Cooley, however, should be **dismissed with prejudice**, as he apparently is deceased.

SCHEDULING ORDER

9 These Findings and Recommendations will be referred to a
10 district judge. Objections, if any, are due by **June 2, 2014**.
11 If no objections are filed, then the Findings and Recommendations
12 will go under advisement on that date. If objections are filed,
13 then any response is due by the earlier of 14 days from the date
14 objections are filed, or **June 19, 2014**. By the earlier of the
15 response due date or the date a response is filed, the Findings and
16 Recommendations will go under advisement.

IT IS SO ORDERED.

Dated this 13th day of May, 2014.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge